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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 342

MADISON L. MILLER, JR.,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF VETERANS' ADMINISTRATION ON SECOND POINT IN THE BRIEF FOR THE UNITED STATES FILED BY THE SOLICITOR GENERAL

The Solicitor General on page 2 of his brief states the question to be:

"2. Does the law authorize the issuance of a regulation making the provisions of the statute relating to compensation applicable to insurance and retroactively effective?"

STATUTES AND REGULATIONS INVOLVED

Public 193, 63d Congress, approved September 2, 1914, entitled "An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department", 38 Stat. 711, and sundry Acts amendatory thereof, all of which are enumerated and the applicable excerpts therefrom copied in this brief or the appendix hereto. (See Index.)

REGULATIONS

Bureau of War Risk Insurance Bulletin No. 1, issued October 15, 1917.

Treasury Decision No. 20, issued March 19, 1918.

Treasury Decision No. 42, issued March 18, 1919.

Treasury Decision No. 42, as amended in April 1920.

Bureau of War Risk Insurance Regulation No. 54, issued July 21, 1920.

Bureau of War Risk Insurance Regulation No. 57, issued November 26, 1920.

United States Veterans' Bureau Regulation No. 4, paragraphs IV and VII, issued September 12, 1921.

Section 1115, compiled Regulations, Veterans' Bureau (Compensation Part).

Sections 3139–40, compiled Regulations, Veterans' Bureau (Insurance Part).

Such regulations or those portions thereof applicable to the present question are copied in this brief or in the appendix hereto, except insofar as the

same are printed in the appendix to the brief filed by the Attorney General.

STATEMENT

The Solicitor General has invited the Veterans' Administration to submit to the Court such historical data and discussion as it is thought may be helpful to the Court in determining the correct construction of the insurance contract provisions, of the statutes involved, and the validity of certain regulations issued during the period of approximately twenty years last past, and pertaining to such contracts, to the construction of said statutes, and the application thereof by the various administrative officers charged with such duty, to wit: the Secretary of the Treasury, the Director of the Bureau of War Risk Insurance, the Director of the United States Veterans' Bureau, and the present official, the Administrator of Veterans' Affairs, successively.

The scope of this brief is limited to this question, viz: the validity of the "specific loss" provisions of the insurance contracts and of the relevant regulations promulgated under the several statutes applicable.

It is believed that the question numbered "2" in the Solicitor General's brief and which is copied on the first page hereof is not at all the real law question now presented to this Court and it may be helpful to restate the question at issue, with which

this brief undertakes to deal. It is accordingly restated as follows:

Was the Bureau of War Risk Insurance, under the direction of the Secretary of the Treasury (and the several administrative officers succeeding to the duties and powers conferred by Public, No. 193 of the 63d Congress, approved September 2, 1914, and the various amendments thereto), empowered to prescribe the term and conditions of the several types of insurance contracts authorized by the statutes in question? Specifically, was the Secretary of the Treasury (and his successors under the various Acts in question) authorized to provide in the insurance contracts issued to members of the military and naval forces during the World War that such contracts should mature by reason of the "total and permanent disability" of the insured (that being one of the contingencies insured against) upon the insured becoming afflicted with certain specified conditions of the body, e. g., loss of two hands, or one arm and one eye, two feet, etc.?

In the instant suit the question arises under a contract of term insurance issued during the period of hostilities while the Petitioner was a member of the military forces of the United States. But the question is vitally important and the decision thereof will be of wide application because of the fact that there are now outstanding and in force approximately 600,000 contracts of

so-called converted insurance issued under the same statutory authority and containing similar provisions with respect to the maturity thereof upon the insured suffering sundry specific losses therein described. These provisions were incorporated in such contracts by virtue of the regulatory and other authority believed to have been conferred upon the Bureau of War Risk Insurance under the direction of the Secretary of the Treasury and upon the designated officials succeeding to the duties and authority of such Secretary.

SUMMARY OF ARGUMENT

1. The Director of the Bureau of War Risk Insurance (and his successors) possessed authority to determine the "terms and conditions" of the proposed insurance contracts, expressly conferred by statute.

2. Such officials similarly possessed authority to determine and prescribe the character and quantum of proof required to establish maturity of the insurance contract, and to make reasonable rules in respect thereto.

3. As a part of such powers, and incident thereto, the Director had the power to, and properly did, provide in the contracts, in regulations, and by instructions to personnel engaged in adjudicating claims asserted by reason of alleged total and permanent disability, certain criteria to govern the determination of such questions—e. g., loss of use of legs, arms, etc.

4. That some or all of such standards of measurement or rules with respect to insurance were similar to or identical with standards of measurement or rules prescribed by the Director or by Congress for application to *compensation* claims is unimportant.

5. The validity and the propriety of the contract provisions in question and of the regulations pertaining to the subject are established by reason of the re-enactment from time to time of the relevant sections of the statutes without change in the language thereof.

6. The uniform construction of the statutes over a period of many years by the administrative officials charged with that duty will not be disturbed by the Court, especially since—

(a) Congress has legislated in the light of such construction without changing the law with respect to the point at issue, and

(b) Congress provided by the Act of July 3, 1930, that the Director's "decisions of questions of fact and law * * * shall be conclusive" (with certain exceptions not here material).

A reconsideration of the entire question has necessarily led to the conclusion that said several administrative officials did possess the power which they exercised and that they were authorized to exercise it in the manner they did.

ARGUMENT

The original statute enacted September 2, 1914, created in the Treasury Department the Bureau of War Risk Insurance and provided that said Bureau "shall, as soon as practicable, make provisions for the insurance by the United States of American vessels, their freight and passage moneys, and cargoes" against the risks of war (Section 2, 38 Stat. 711).

Section 4 of said Act provided that said Bureau, with the approval of the Secretary of the Treasury, "shall have power to make any and all rules and regulations necessary for CARRYING OUT THE PURPOSES of this Act." 38 Stat. 711.

The original Act was amended June 12, 1917, by Public, No. 20 of the 65th Congress. This amendment enlarged the scope of the insurance to include Masters, officers, or crews of American vessels, as well as vessels, their freights and cargoes. This insurance was to cover against loss of life or personal injury and for compensation during detention following capture by the enemy. 40 Stat. 102.

Section 4 thereof amended Section 3 of the prior Act and authorized the Bureau "to adopt and publish FORMS OF WAR RISK policies and to fix rates of premiums." 40 Stat. 103.

Section 5 added a new section to the prior Act, 3a, which provided that "Such insurance shall provide, * * * In case of death, or permanent disability which prevents the person injured from

performing any and every kind of duty pertaining to his occupation, or THE LOSS OF BOTH HANDS, BOTH ARMS, BOTH FEET, BOTH LEGS, or BOTH EYES, OR ANY TWO THEREOF" for the payment of certain sums of money therein stated. 40 Stat. 103.

Paragraph (b) provided that for the loss of one arm 65% of the principal sum should be paid, and for the loss of one eye, 45% of the principal sum; total destruction of hearing 50%, etc. 40 Stat. 103. The Bureau was further authorized to "include in its policy undertakings to pay specified percentages of the principal sum for other losses or disabilities."

It will be noted that the percentage evaluation specified in the statute for the loss of one arm, and one eye, aggregates 110%.

On October 6, 1917, there was approved an amendment to said Act of September 2, 1914, which not only extended the insurance to members of the military and naval forces, but provided for compensation and allotments and family allowances for the members of such forces. (Public 90, 65th Congress.) 40 Stat. 398. Section 13 of this Act of October 6, 1917, provided that the director of the Bureau of War Risk Insurance under the general direction of the Secretary of the Treasury should "administer, execute, and enforce the provisions of this Act and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act,

necessary OR APPROPRIATE to carry out its PURPOSES, and shall decide all questions arising under the Act, * * *. The director shall adopt reasonable and proper rules to govern the procedure * * * to regulate and provide for the *nature and extent of the proofs and evidence* and the method of taking and furnishing the same in order to establish the right to * * * compensation, OR INSURANCE provided for in this Act, * * * and the manner and form of adjudications and awards." 40 Stat. 399.

Pursuant to such authority the administrative officers did determine that proof of existence of any of the enumerated specific losses should be the quantum of proof necessary to establish maturity of the contract.

Section 20 appropriated certain sums and provided that "Payments from this appropriation shall be made upon and in accordance with awards by the director." 40 Stat. 400.

Section 400 (being the first section in Article IV of the Act of October 6, 1917) was the basic authorization for insurance to be issued members of the military and naval forces to cover "the death OR TOTAL PERMANENT DISABILITY of any such person." 40 Stat. 409.

Section 402 of said Act required the director to "promptly determine upon and publish the full and exact terms and conditions of such contract of insurance", and provided for payment in case of death to certain designated relatives "and also

during permanent and total disability to the injured person." 40 Stat. 409. Section 402 further provided that "Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for ALTERNATIVE BENEFITS TO THE INSURED and the beneficiaries as may be found to be reasonable and practicable, MAY BE PROVIDED FOR in the contract of insurance, or from time to time by regulations." 40 Stat. 409.

Bulletin No. 1 of the Bureau of War Risk Insurance was promulgated by the Director thereof October 15, 1917, pursuant to the afore-mentioned statutory requirements. There was incorporated therein a form of the policy as required which appears in the appendix of this brief. It will be noted that this form provided that the insurance was granted subject to the above-mentioned statutes and "*of any amendments thereto and all regulations thereunder now in force or hereafter adopted.*" It did not within its provisions define "total permanent disability", but simply stated that if the insured should become "totally and permanently disabled, *commencing with such disability as established by the award of the director* * * *."

It also contained a provision that the insurance might be converted into any form "selected from

among those that may be prescribed by regulations of the bureau."

On March 9, 1918, the Secretary of the Treasury approved and there was promulgated what is known as "Treasury Decision No. 20", Bureau of War Risk Insurance. This was issued under authority of Section 13 of the Act of October 6, 1917, and defines "total permanent disability." It is general in its terms and *does not purport to be exclusive.* It does not in terms refer to any of the so-called "specific losses" (amputation, etc.). The general definition of total permanent disability is by the terms of said Treasury Decision No. 20, applicable to compensation and insurance alike, the former being provided for in Article III and the latter in Article IV of the Act of October 6, 1917. A complete copy of Treasury Decision No. 20 appears in the appendix hereto.

During the latter part of 1917, and most of the year 1918, the war was in progress and necessarily there was little time available for formulating definite policies with respect to military and naval insurance by the Bureau, especially in view of the fact that it was largely concerned with family allotments, allowances, disability compensation, and a tremendous task of forming an organization.

It will be recalled that Article III deals with compensation and Article IV with insurance, and that in Article III, in addition to the general provisions with respect to total disabilities, certain so-called "specific losses" are enumerated and com-

pensation at the rate of $100.00 per month provided therefor, although under the general provisions of the Act of October 6, 1917, "total disability" entitled the applicant to $30.00 per month. Section 302. 40 Stat. 406.

The earliest form of converted insurance policy authorized and promulgated by the Bureau of War Risk Insurance (February 19, 1919) contains in paragraph 9 thereof a definition of "total permanent disability", upon the occurrence of which the contract matured. It is as follows:

> * * * Total permanent disability as referred to herein is an impairment of mind or body due to injury or disease, which will prevent the Insured from following continuously and permanently any substantially gainful occupation. Without prejudice to any other cause of disability, it is further agreed that the entire and irrecoverable loss of the sight of both eyes, or the severence of both hands at or above the wrists, or of both feet at or above the ankles shall be considered as total permanent disability within the meaning of this contract. * * *

In March 1919 the Form of Policy just mentioned was revised somewhat. Paragraph 9 of this revised form defines "total permanent disability" as follows:

> Total permanent disability as referred to herein is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substan-

> tially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Without prejudice to any other cause of disability, it is further agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet shall be considered as total permanent disability within the meaning of this contract. * * *

It is evident that this is the Form No. 741, one of those mentioned in Treasury Decision No. 42, dated March 18, 1919, entitled: "Regulation Prescribing the Forms of Application and Policies to be used in the conversion of War Risk Insurance." Said Treasury Decision No. 42 recites that such form (and others therein mentioned) are "on file in the Office of the General Counsel of the Bureau of War Risk Insurance" and authorizes the making of contracts "under terms and conditions set forth therein."

In the meantime, the statute was further amended by Public, No. 151 of the 65th Congress, 40 Stat. 555, approved May 20, 1918; but the above quoted and referred to portions of Section 13 of the Act of October 6, 1917, were reenacted without substantial change so far as the present question is concerned. Public, No. 175 of the 65th Congress, approved June 25, 1918, made sundry changes in various sections of the law but Section 402 was

reenacted without substantial change so far as the present question is concerned.

On December 24, 1919, there was approved Public, No. 104 of the 66th Congress, 41 Stat. 371, which amended the statute in several respects. But the only change which is possibly relevant to the present question was contained in Section 11 thereof, amending Section 302 of the War Risk Insurance Act by providing (41 Stat. 373):

> That the loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total and permanent disability * * *.

In April 1920 the aforementioned Treasury Decision No. 42 was amended and new forms were substituted for those bearing the same numbers mentioned in Treasury Decision No. 42 of March 18, 1919,

> which said new forms, and not those referred to in said Treasury Decision No. 42, shall be used in the conversion

of the term insurance. The Form 741 filed with and referred to in said revised Treasury Decision 42 contained the following language in paragraph 9 thereof:

> Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substan-

> tially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it * * *. Without prejudice to any other cause of disability, it is agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet, or the loss of one hand and one foot, shall be considered as total permanent disability within the meaning of this contract; * * *.

On July 21, 1920, Regulation No. 54 was promulgated by the Bureau of War Risk Insurance, the first paragraph thereof providing that "awards of insurance and compensation shall be based upon the same standards." The remainder of the order relates to procedural matters within the Bureau.

A memorandum signed by the then Director of the Bureau of War Risk Insurance and found in the file pertaining to said Regulation No. 54, dated July 20, 1920, requests approval of such regulation "at the earliest possible moment", and then states: "It will greatly expedite the handling of both insurance and compensation claims involving total permanent disability."

Regulation No. 57, promulgated by the Bureau of War Risk Insurance November 26, 1920, so far as material here, is copied on page 38 et seq. of the Solicitor General's brief. Attention is particularly invited to paragraph VII of said regulation, which provides that *awards of insurance may be "made*

in accordance with the provisions of paragraph IV" of such regulation. Said paragraph IV is in subdivision B of the regulation. It reads:

> IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:
>
> (a) When a statutory total permanent disability entitles a person to such rating, viz, loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden.
>
> (b) ----------
>
> (c) ----------

Said regulation was approved by D. F. Houston, Secretary of the Treasury, on November 26, 1920.

A noteworthy circumstance in connection with this question is that for nearly twenty years, with many officials considering the question from various angles, no one has entertained any doubt that as a matter of actual fact any person who suffered any of the *specific* losses mentioned in Regulation 57, or who had become "helpless and permanently bedridden", was, and necessarily must be, "totally and permanently disabled" for all purposes. It will be noted also that the conditions described in subparagraph (a) of paragraph IV of said Regulation No. 57 are the identical conditions "deemed to be total and permanent disability" by the terms of

paragraph 3, Section 302, of the War Risk Insurance Act as amended by Section 11 of Public, 104, 66th Congress, approved December 24, 1919.

This *fact,* however, does not support a *conclusion* that these specific losses were recognized to constitute "total permanent" disability for the reason that they were also recognized as applicable to compensation and were embodied in that portion of the statute relating to compensation. It is quite as reasonable to conclude they were so recognized for insurance purposes because they obviously did, as a matter of general knowledge and experience, produce such disability in one so afflicted. Common sense and the statute probably operated concurrently.

But, in any event, if the Director adopted for the purpose of insurance contracts the same standard of measurement for specific disabilities which Congress adopted for compensation purposes, it cannot be said the Director's determination was unreasonable. If reasonable, it was certainly within his power.

Evidently the then Director of the Bureau of War Risk Insurance followed the well-settled construction of the expression "total permanent disability" as reflected in numerous decisions by the State and Federal courts prior to the enactment of the statute under consideration.

Public, No. 47, of the 67th Congress, approved August 9, 1921 (42 Stat. 147), created the Veterans' Bureau, and by Section 3 thereof

> The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made a part of the Veterans' Bureau * * * (42 Stat. 148).

Section 404 of Public No. 47 relates to the conversion of the term insurance theretofore written "*into such form or forms of insurance as may be prescribed by regulations and as the insured may request.*" Throughout said Act large discretionary powers are vested in the Director of the Veterans' Bureau and extensive authority is granted to him with respect to the promulgation of regulations pertaining to the subject matter within his jurisdiction. Section 30 of said Act added to Section 411 of the War Risk Insurance Act as follows:

> * * * policies of insurance heretofore or hereafter issued in accordance with Article IV of the War Risk Insurance Act shall be incontestable after six months from date of issuance, or reinstatement, except for fraud or nonpayment of premiums (42 Stat. 157).

Pursuant to the authority contained in the Act of August 19, 1921, the Director of the Veterans' Bureau, on September 12, 1921, promulgated "Veterans' Bureau Regulation No. 4." Its terms, so far as this question is concerned, are the same as subparagraph (a) of paragraph IV of said Regulation No. 57. The first sentence of paragraph VII of Regulation No. 4 is identical with the corresponding sentence in Regulation No. 57.

The next legislation touching this question was the World War Veterans' Act, approved June 7, 1924. Public 242, 68th Congress, 43 Stat. 607, 38 U. S. Code 193 et seq.

Section 202 thereof enumerates various benefits available, including compensation. Subparagraph 3 thereof provides "If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month: *Provided, however,* That the permanent loss of the use of both feet or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears or becoming permanently helpless or permanently bedridden, shall be deemed to be total, permanent disability: * * *." And further provides for higher rates of compensation for total blindness, and for total blindness plus the loss of one or more limbs.

Subparagraph 4 provides that "A schedule of ratings of reductions in earning capacity * * * shall be adopted and applied by the Bureau."

Section 300 of that Act relates to insurance and is in substantially the same language as the prior Acts, so far as this question is concerned.

Section 301 provides that all term insurance shall be converted not later than July 2, 1927, into such *"form or forms of insurance as may be prescribed by regulations and as the insured may request."*

Public No. 448 of the 69th Congress, approved July 2, 1926 (44 Stat. 790), amended the World War Veterans' Act in several respects but Section 300 in which is described the disability insured against uses the same words as used throughout, viz: "total permanent disability."

This Act also amended Section 202, and added a specific loss to those enumerated in Section 202 as it appeared in the Act of June 7, 1924, quoted above, to wit: "the organic loss of speech."

Sections 202 and 301 were again amended by Public No. 585 of the 70th Congress, approved May 29, 1928 (45 Stat. 964), but the same description of the loss insured against to wit, "total permanent disability" was used and the language of Section 301, with respect to the forms of insurance, being those prescribed by regulation, remained unchanged.

Public 522 of the 71st Congress, approved July 3, 1930 (46 Stat. 991), again amended the World War Veterans' Act in sundry respects. The first Section of that Act amends Section 5 of the Act of June 7, 1924, and as amended it reads:

> "The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and

> SHALL DECIDE ALL QUESTIONS arising under this Act; and all DECISIONS OF QUESTIONS OF FACT AND LAW affecting any claimant to the benefits of Titles II, III, or IV SHALL BE CONCLUSIVE except as otherwise provided herein. * * *"

Title II relates to compensation and Title III relates to insurance. The exceptions indicated are those pertaining to suits on insurance contracts.

Section 202 was reenacted as part of Public 522, with certain changes not here material. As reenacted it contained the same provisions with respect to specific losses as are quoted above, including the "organic loss of speech."

The specific losses (amputations, blindness, etc.) enumerated in the World War Veterans' Act of June 7, 1924, and the amendments thereto, as indicated above, are identical with the specific losses enumerated in Section 3122 of the Veterans' Bureau Regulations, pertaining to converted insurance, and 3140 thereof, pertaining to term insurance. These Regulations were promulgated in March 1930.

It is apparent that the genesis of all these specific loss provisions was the Act of June 12, 1917 (40 Stat. page 102) amending the War Risk Insurance Act of September 2, 1914, and providing for payment of the principal sum or certain portions thereof to seamen on merchant vessels who suffered similar specific losses; plus the exercise by the

Director of the authority vested in him to determine the terms of the contract.

The caution at the end of Section 1115 of the Regulations, to wit, "A rating of permanent and total disability for insurance purposes will have no effect on compensation, and vice versa", obviously was directed to what might be termed the general disability cases as distinguished from the specific loss cases. It is incorporated in the section of regulations governing the adjudication of compensation claims, for the guidance of the rating boards functioning in that connection. The first paragraph of Section 1115 of the Regulations enumerates the same specific or so-called statutory losses as are embodied in the statutes just mentioned. As indicated, these identical losses are incorporated in the insurance contracts and in Sections 3122 and 3140 of the Regulations, being that part pertaining to insurance. It is respectfully reiterated that this does not necessarily mean they were incorporated in the insurance contracts *because* they appeared in the statute. The same enumeration of specific losses is contained in the later editions of the printed policies of "Government Life Insurance" or so-called converted insurance.

Nowhere in any of the numerous changes in Regulations, the numerous amendments and reenactments of various statutes on the subject, or in the several revisions of the insurance contracts themselves, or in the legislative or administrative history in connection with any of these changes,

does there appear to have been at any time during the period of approximately twenty years since the first enactment on the subject, any doubt in the mind of any official concerned with the subject as to the legality and propriety of the provisions now under discussion, to wit, the specific loss provisions in the insurance contract. These provisions are very similar to provisions contained in various disability insurance contracts issued by private corporations. Until the more recent changes embodying loss of hearing and of speech, they were substantially the same as the more or less standard disability insurance contracts. The other provision contained in the specific loss section of the Government insurance contract, to wit, "becoming permanently helpless or permanently bedridden", hardly calls for comment except to say that one could not imagine any case where an insured so afflicted would not be entitled to recover on an insurance contract insuring against total permanent disability, quite aside from the incorporation of any such language in the contract. There may be some "sales value" in specifically reciting such provision, somewhat as is true in commercial accident policies which specifically recite that they cover death or injury from lightning or sunstroke, or blood poisoning resulting from an accident. In most jurisdictions such language adds nothing at all to the scope of the contract.

In order to carry out the mandate of Congress with respect to carrying on Government insurance after the war, the administrative officials charged with the duty recognized that in order to maintain a reasonable and proper "spread of the risk" the contracts must in general conform to those offered by private corporations. If this were not so, then the Government would not retain any substantial number of *first class* risks. It was apparent that Congress intended these insurance activities to be carried on in a conservative, reasonable, business-like manner.

It is believed that so far as the scope of the risks covered is concerned, there is no difference between the present situation and that intended to be created by the early enactments of Congress pertaining to insurance (term insurance). In short, "the insurance" about which Congress legislated more or less continuously from 1914 to 1930 was a contract relating to that type of relationship generally understood as created and existing between the insurer and the insured with respect to the "coverage", or subject matter of the insurance contract. "Total permanent disability" had a fairly well defined and understood meaning not only by reason of general use of the term, but also because of judicial construction thereof in sundry cases decided prior to the World War. As a general rule and particularly if the insured is suffering from some affliction within the body, the term is more or less flexible. Certain conditions, however, so generally

incapacitate those suffering therefrom that reasonable men did not and do not differ on the question of whether such conditions in fact produce "total permanent disability." The expression has been so often discussed and defined that we will not burden the Court further in respect thereto. If it should be conceded that occasionally some very exceptional person, with exceptional mental endowment and exceptional economic opportunity, may possibly produce some income notwithstanding he is totally blind or has lost both legs or one arm and one eye, or has suffered some of the other afflictions indicated in the specific loss provisions of the contract, nevertheless we are dealing with a practical and not a theoretical or abstract problem. It seems entirely clear that Congress intended for a contract to be made for practical purposes. It follows that the terms therein, the construction thereof, and the adjudication of claims arising thereunder should be reasonable, businesslike, and practical.

It is submitted that under the broad authority and power granted to the Secretary of the Treasury in the earliest enactments, and to his successors by the later enactments, it is entirely clear that such officials could properly make the contracts they did make, and which included the so-called "specific loss provisions"; and further, that without any such provisions in the contracts, such officials could properly have adjudicated claims upon the standards indicated. Some standard for the guidance of the subordinates actually doing the

rating was and is indispensable. In the last analysis the enumeration of these specific losses, so called, is nothing more nor less than laying down a rule of measurement found by experience to be substantially accurate. That it is incorporated in the contract, in the Regulations or in certain internal instructions or general orders, is a detail of no importance so far as the principle involved is concerned.

But even if it were believed that the construction of the various statutes by the several officials primarily charged with the duty of construing and administering them over a period of years was erroneous, such construction having been uniformly given by these various administrative officials and having been applied in hundreds of thousands of cases and incorporated in over half a million contracts now outstanding and in force, it is well settled law that such construction will be adhered to and adopted by the Court.

In the case of *Hahn* v. *United States*, 107 U. S. 402, the Appellant sought to recover a share in certain fines and forfeitures accruing at the Port of New York and his right thereto turned primarily upon the proper constructions of a statute enacted in 1867. Under the construction thereof which had been adopted and followed by the Treasury Department, he was not entitled to participate in such fines, etc. This Court approved the reasoning and conclusions of the Court of Claims which emphasized the fact that Congress

> had not interfered with such constructions by the Secretary of the Treasury while the Act was in force.

This was in accord with the case of *United States* v. *Pugh,* 99 U. S. 265, wherein this Court in the course of its opinion observed—

> In the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect.

In *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price for transporting mails where the carrier had received land grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1885 by three Postmasters General. Then a new Postmaster General sought to change the construction and this Court denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621), it is said:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive

> in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be ACTED UPON FOR A NUMBER OF YEARS, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. * * *

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361 (at 401), this Court clearly indicated that notwithstanding the fact that it might disagree with the construction of the statute in certain particulars, nevertheless, since the rulings had been made by such Commission during "the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the 'Act to Regulate Commerce' is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; * * * We make this concession because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, AND HAS BEEN IMPLIEDLY SANCTIONED BY THE REENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS

CONSTRUED, when not plainly erroneous, must be treated as read into the statute" (page 402).

In *National Lead Company* v. *United States*, 252 U. S. 140, this Court again recognized the binding effect of the administrative construction of a statute extending over a substantial period of time. A "draw back" under the customs act was there involved. In the course of the opinion, after restating the rule above indicated, this Court said:

> To this we must add that the department's interpretation of the statute has had such implied approval by Congress, that it should not be disturbed * * *. The draw back provision under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870 and the Court of Claims finds that the rule for determining the draw back on oil cake was applied during the whole of that period of almost ten years * * *. The reenacting of the draw-back provision four times without substantial change, while this method (i. e. departmental formula) of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute. * * * (Citing cases) * * * for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government.

Attention is invited to the fact that the Secretary of the Treasury and his successors uniformly construed the insuring provisions in question from the beginning of operations under the Act of October 6, 1917, amending the original War Risk Insurance Act of September 2, 1914, as will be noted from the detailed history of the legislation hereinabove pointed out. Congress legislated on this subject almost continually. Various Sections of the Statute affecting the subject matter presently in issue were from time to time amended and rewritten. But nowhere has Congress during the intervening period of nearly twenty years indicated, directly or by implication, that the construction by the Secretary of the Treasury, and by the administrative officers successively performing the functions originally vested in the Secretary under the War Risk Insurance Act, was erroneous or contrary to the congressional intent. On the contrary, the terms of the contracts of insurance, as determined upon and adopted by the Bureau of War Risk Insurance and its successors, have received the sanction of legislative approval by Congress by virtue of the successive reenactments of the various sections of the statute after the construction thereof now questioned had been adopted by the administrative officials.

Express approval by Congress, and express confirmation of power vested in the Director (now Administrator) is manifested by the July 3, 1930, amendment to Section 5 of the World War Veter-

ans' Act. (Section 1, Public 522, 71st Congress, 46 Stat. 991.)

The first sentence of that section as amended July 3, 1930, reads:

> SEC. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact AND LAW affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. * * *

The language is identical with the original Act of June 7, 1924, except that the words "and law", appearing in capitals in the above quotation were added by the Act of July 3, 1930. It is believed the power and the right asserted clearly existed theretofore, but if there existed any doubt on that point, certainly all such doubt was removed upon the approval of said Act of July 3, 1930.

Clearly, somebody was charged with the duty of determining the exact terms of the contract by Congress authorized and which was to be sold to several million men, comprising the military and naval forces of the United States. The power and authority to determine these terms of the proposed

contract was vested in the Secretary of the Treasury (Bureau of War Risk Insurance). Necessarily, the exercise of such power involved some considerable discretion. The purpose, as declared by Congress, was to insure against two certain contingencies, one described in very general terms. The happening of those contingencies necessarily had to be determined; and in cases of disability, the extent thereof ascertained. In the nature of things determination in the individual cases must be done by numerous subordinate officials and employees. It should not be left to the mere whim or the individual opinion of such adjudicating personnel. Certain more or less definite rules of measurement were indispensable. These rules, the Secretary of the Treasury and his successors determined upon and promulgated as contemplated and provided by Congress, and such rules became, were, and are those reasonable "rules and regulations not inconsistent with the provisions of this Act necessary or APPROPRIATE to carry out its PURPOSES", authorized by Section 13 of the Act of October 6, 1917. (40 Stat. Part 1, 398.)

They and their amendments, whether incorporated in regulations, denominated as such, or in the "policy" or contract, constituted the reasonable "rules and regulations" authorized in the successive acts from 1917 to the present which dealt with the subject matter of the present litigation. The reasonableness of the specific loss provision promulgated by the Secretary and his successors

is illustrated by the fact that Congress provided, in dealing with such specific losses in the case of seamen (in the Act of June 12, 1917, 40 Stat., Part 1, page 102), that 65% of the principal sum of the insurance contract should be payable for the loss of one arm and 45% thereof for the loss of one eye. During the many years this insurance has been in effect, and in spite of the numerous cases disposed of administratively and as the result of litigation, the validity of the so-called "specific loss provisions" of the insurance contract has not heretofore been questioned. In the opinion of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Cole*, 45 F. (2) 340, they were *assumed* to constitute part of the contract.

The rule indicated by this Court in numerous decisions, a few of which have been cited, has been recognized as applicable to the administrative practice of the Veterans' Bureau (Successor to the Bureau of War Risk Insurance). Attention is invited to page 146, volume 35, Opinions of the Attorneys General of the United States, where, in an opinion by the Attorney General, it is stated:

> "* * * I am informed that the Veterans' Bureau has construed compensation remaining uncollected to which a veteran is entitled at the time of death or permanent total disability as including compensation which is uncollectible at that time because of section 210, and has acted upon this construction in a large number of cases.

> If the construction placed upon a statute by the Department charged with its administration is not clearly erroneous, and has been followed in many cases, it should be respected and not overruled except for cogent reasons. * * *"

On February 28, 1933, the Attorney General addressed an opinion to the Administrator of Veterans' Affairs, relative to the naval pension payable under Sections 4756–7 of the Revised Statutes. In the course of this opinion the Attorney General stated:

> I have examined the question on the merits and it is obviously a debatable one. I admit the force of the arguments which have been advanced in support of the contention that payments under these two laws may be made concurrently, and if the question were a new one in respect to which there had been no prior rulings or administrative practice, it is possible that I would adopt the views expressed by members of your legal staff. The question, however, is not a new one. It has been the uniform administrative practice for a number of years to decline to make concurrent payments under both statutes, and it is nearly five years since the Comptroller General rendered a formal decision holding that such payments could not be made concurrently. In my service here in the Department of Justice I have adhered very strictly to the rule that wherever there is room for reasonable differences of opinion as to

> the meaning of a statute, long and consistent administrative interpretation of it by the officers charged with the duty of administering it should be followed. I have repeatedly urged that contention before the courts in Government litigation. It is undesirable from many points of view to overturn long-continued administrative practices based on an administrative construction of a statute. It appears in the present instance that the practical construction heretofore followed has been adhered to for a number of years and that *the Congress has not been dissatisfied with it or seen fit to modify it by legislative enactment.* * * *

The rule was recognized as late as 1932 and applied by this Court to certain Circuit Court rules relating to the assignment of United States Judges. *Johnson* v. *Manhattan Railroad Company*, 289 U. S. 479.

The regulations as promulgated, and certificates or policies of insurance issued by the Bureau of War Risk Insurance, and its successors, specifically recited that the maturity thereof because of the occurrence of "total and permanent disability" would be recognized to exist if and when the insured suffered certain specific disabilities from time to time enumerated in the contracts themselves or in regulations or instructions issued by the Director. This was in accordance with the terms of the statutes and of Bulletin #1, promulgated by the Bureau of War Risk Insurance Oc-

tober 15, 1917. All such changes, therefore, became embodied in all insurance contracts issued by the Bureau, irrespective of the date of issue.

The conclusion is irresistible that such specific loss provisions in said contracts and in the regulations and instructions on such subject were and are valid, and this Court should so hold.

Respectfully submitted.

JAMES T. BRADY,
Solicitor.

Y. D. MATHES,
Special Assistant Solicitor,
Veterans' Administration.

APPENDIX

INDEX

Bulletin No. 1.
Treasury Decision 20.
Bureau of War Risk Insurance Regulation 57.
Veterans' Bureau Regulation 4. (See Appendix to Attorney General's brief where portions of these are copied.)
Section 1115 compiled Regulations Veterans' Bureau (Compensation Part).
Sections 3139–40 Regulations Veterans' Bureau (Insurance Part).

BULLETIN NO. 1

DIVISION OF MILITARY AND NAVAL INSURANCE

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

OCTOBER 15, 1917.

I, William C. De Lanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department', approved September 2, 1914, and for other purposes", approved October 6, 1917, hereby, on this 15th day of October 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

1. Insurance will be issued for any of the following aggregate amounts upon any one life:

* * * * *

which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability, for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all, including months of disability already paid for, in both cases except as otherwise provided.

2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates:

* * * * *

Rates at ages higher or lower will be given on request.

The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected before the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at net rates computed by the bureau according to the American experience table of mortality and interest at 3½ percent per annum.

3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(Form of policy for $5,000)

Military and Naval Insurance Policy

Amount, $5,000, No. 1. Age 25.
Monthly installments, $28.75.

THE UNITED STATES OF AMERICA, TREASURY DEPARTMENT, BUREAU OF WAR RISK INSURANCE

Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:

Hereby insures from and after the ------ day of ----------, 19--, John Doe of Illinois, private, Company A Third Infantry, conditioned upon the payment of premiums as herein provided, for the principal amount of $5,000, converted into monthly installments of $28.75 (the equivalent, when paid for 240 months, of the sum insured, on the basis of interest at the rate of 3½ percent per annum) payable—

To the insured, if he/she, while this insurance is in force, shall become totally and permanently disabled, commencing with such disability as established by the award of the director of the bureau and continuing during such disability; and

To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the in-

sured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments have been paid for total and permanent disability or if any such installments have been paid, then for a number of months sufficient to make 240 in all:

To Sarah Doe, wife of the insured—

If no beneficiary within the permitted class be designated by the insured, either in the insured's lifetime or by his last will and testament, or if any above-designated beneficiary is or becomes disqualified or does not survive the insured, the insurance (or if any above-designated beneficiary shall survive the insured, but shall not receive all the installments, then the remaining installments) shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the insured's place of residence be entitled to his personal property in case of intestacy.

If the insured became totally and permanently disabled before this policy was applied for, it shall nevertheless be effective as life insurance, but not as insurance against such disability.

This policy is not assignable, and payments thereunder to the insured or a beneficiary are not subject to claims of creditors of the insured or beneficiary.

The insured may at any time, subject to the regulations of the bureau, change the beneficiary or beneficiaries to any person or persons within the classes permitted by the act without the consent of the beneficiary or beneficiaries.

Upon the written request of the insured, accompanied by this policy for indorsement, or after his/her death, upon request of a beneficiary at the

time of making claim, the insurance payable to any beneficiary may be converted into installments of reduced amounts payable for 240 months certain and for as much longer as such beneficiary shall survive, such installments to be computed in accordance with the American Experience Table of Mortality and 3½ percent interest.

Premiums shall be paid monthly on or before the last day of each calendar month, and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau.

If the age of the insured has been misstated, the amount of insurance shall be adjusted at the

amount not in excess of $10,000, which the premium actually paid would purchase at the insured's attained age.

During the present war and for not more than five years thereafter, or until the earlier conversion of this policy, as hereinafter provided, the monthly premiums shall be in accordance with the following table of rates, increasing at each anniversary of the policy to the rate for his/her then attained age:

* * * * *

Not later than five years after the war this policy, if written request be made to the bureau therefor, accompanied by this policy, will be converted without medical examination into any form of insurance selected from among those that may be prescribed by regulations of the bureau. Such converted insurance will be at net premiums, computed in accordance with the American experience table of mortality and 3½ percent interest per annum and will provide for cash, loan, paid-up, and extended insurance values.

Wherefore the United States of America has caused this policy to be signed by the Secretary of the Treasury and by William C. De Lanoy, the

Director of the Bureau of War Risk Insurance, and countersigned by the registrar or an assistant registrar of the bureau.

W. G. McAdoo,
Secretary of the Treasury.

William C. De Lanoy,
Director of the Bureau of War Risk Insurance.

Countersigned at Washington, D. C., this _____ day of _____, 19__.

_____,
Registrar.

(Here follows certain information pertaining to the provisions of the statute.)

Note.—Treasury Decision No. 18 does not contain a ruling of the Bureau but is a reprint of the Joint Resolution granting to certain persons an extension of time to April 12, 1918, in which to apply for insurance.

Treasury Decision No. 19 is not concerned with the military and naval provisions of the Act.

Nos. 18 and 19 are not being distributed.

(T. D. 20 W. R.)

Total Disability

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

Treasury Department,
Bureau of War Risk Insurance,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following

regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

An impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY, *Director.*

Approved:

W. G. MCADOO,
Secretary of the Treasury.

VETERANS' BUREAU REGULATIONS

(Compiled)

(Compensation Sections)

SEC. 1115. For compensation purposes a disability from an injury or disease shall be rated as

total and permanent under any of the following conditions:

(A) STATUTORY.—When a statutory permanent total disability entitles a person to such rating, viz: "loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden."

(B) WHEN SHOWN BY EVIDENCE.—When from the evidence submitted it is determined that there is present any impairment of mind or body which continuously renders it impossible for the average man to follow any occupation similar to that of the disabled veteran at the time of enlistment and which is founded upon conditions which render it reasonably certain that it will continue throughout the lifetime of the person suffering from it. The impairment in earning capacity in each individual case will not be considered so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury. In arriving at a decision the average impairment in ability to secure employment which results from the service connection injuries will be considered.

Furthermore, permanent and total disability may be conceded in a proper case where there are present two or more disabilities, affecting entirely different functions, one of which is 65 percent disabling and which combined by present methods to 85 percent. These evaluations, however, upon which permanent and total disability may be con-

ceded are not intended to be rigid unalterable standards. They are city as illustrative and to be used as guides.

A rating of permanent and total disability for insurance purposes will have no effect on compensation, and vice versa (March 2, 1931).

Veterans' Bureau Regulations

(Compiled)

(Insurance Sections)

Sec. 3139. Any impairment of mind or body which renders it impossible for the disabled person (insured under yearly renewable term insurance) to follow continuously any substantially gainful occupation shall be deemed to be total disability. Total disability shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

Sec. 3140. Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or both eyes, or of one foot and one hand, or of one foot and one eye, or of one

hand and one eye, or the loss of hearing of both ears, or the organic loss of speech, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability under yearly renewable term insurance. Monthly installments of insurance for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and any premiums paid after the date of such total permanent disability shall be refunded without interest.

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